

Service Date: September 1, 1993

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MONTANA

* * * * *

IN THE MATTER OF GROUSE MOUNTAIN)	
ASSOCIATES, LTD., dba GROUSE)	TRANSPORTATION DIVISION
MOUNTAIN LODGE, Petition for)	
Declaratory Ruling on the)	
Application of Motor Carrier Laws)	
to the Transportation of Hotel)	DOCKET NO. T-93.33.DR
Guests.)	

DECLARATORY RULING

Introduction

1. On March 9, 1993, Grouse Mountain Associates, Ltd., dba Grouse Mountain Lodge (Grouse Mountain), a hotel business located at Whitefish, Montana, filed a Petition for Declaratory Ruling before the Montana Public Service Commission (PSC). The Petition requests a ruling on the application of PSC-administered motor carrier laws to Grouse Mountain's "courtesy" transportation of its hotel guests.

2. On April 7, 1993 the PSC issued a Notice of Petition for Declaratory Ruling, setting forth the facts stated and the question of law presented by Grouse Mountain and allowing 20 days for comment from interested persons. Public comments were received in support of the Petition, in opposition to the Petition, and in merely expressing views on the matter.

3. On April 1, 1993, Randall Johnson, dba Flathead Glacier Transportation and Whitefish Sober Chauffeur Taxi, Inc. (Johnson), filed a Motion to Defer PSC consideration of Grouse Mountain's Petition. The Motion was based primarily on the existence of a pending court action (Cause No. DV-93-82A, Eleventh Judicial District) previously brought by Johnson against Grouse Mountain and including a similar question of law as that presented in the Petition. On May 3, 1993 the PSC granted Johnson's Motion and deferred action on the Petition. On May 24, 1993, the PSC reinstated action on the Petition, a

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Motion by Grouse Mountain then disclosing that the court action had been stayed pending a determination by the PSC.

4. In this proceeding Johnson has made several procedural requests or arguments. Johnson requested a hearing on the matter. Requests for hearing generally are granted in declaratory rulings only when there are problems such as the facts stated by the Petitioner are unclear or a need exists to explore or better understand the environment in which the ruling will apply and there is no less burdensome means to solve those problems. The given facts and the environment in which a ruling will apply in this instance are clear. Johnson's request is denied.

5. Johnson also disputes the facts provided by Grouse Mountain. Declaratory rulings are based on facts as given by a petitioner and normally do not entail a process to resolve or determine a contest of those facts (distinguish the contested case procedure at Sections 2-4-601 through 2-4-631, MCA). If the facts as given in a Petition for Declaratory Ruling are not accurate, the Petitioner is at risk that the ruling simply will not be applicable. The facts used in this ruling will be Grouse Mountain's stated facts. Any request by Johnson to contest facts or provide additional facts is denied.

6. In this proceeding Grouse Mountain has made several procedural arguments concerning lack of notice, absence of service, ex parte contacts, party status, and improper intervention. Procedures in declaratory rulings are governed by Section 2-4-501, MCA (MAPA), and ARM 1.3.226 through 1.3.229 (A.G. Model Rules, adopted by the PSC pursuant to ARM 38.2.101). These provisions have no notice, service, intervention, ex parte, or hearing requirements. Under these governing provisions the declaratory ruling procedure appears to be designed to allow a procedure that is unburdensome and a prompt answer to the question presented. Although it may be courteous that key participants in declaratory rulings exchange papers and keep each other informed, it is not a requirement in actions before the PSC unless the PSC orders otherwise. In several of these regards, the more common administrative rulemaking procedure operates in a similar fashion. See, generally, Sections 2-4-301 through 2-4-315, MCA. Neither declaratory rulings nor rulemaking require the more comprehensive and elaborate "contested case" procedures prescribed in Sections 2-4-601 through 2-4-631, MCA. Any request by Grouse Mountain to impose contested case procedures for notice, service, ex parte contacts, party status, or intervention is denied.

Analysis

7. The facts stated in the question presented by Grouse Mountain are that Grouse Mountain operates a hotel in Whitefish, Montana, providing lodging, food, and beverages to paying guests. In conjunction with its hotel operations it owns two 9-12 passenger vehicles and two 20-30 passenger vehicles which it uses to transport its registered guests between (to and from) its hotel and Glacier International Airport, the Amtrack rail station in Whitefish, Big Mountain Ski and Summer Resort, near Whitefish, and downtown Whitefish. It charges a fee of \$2.00 per passenger for transportation between its hotel and downtown Whitefish. In the other transportation movements of guests it does not charge a fee. Grouse Mountain does not advertise or offer transportation services to the general public.

8. The question of law present in Grouse Mountain's Petition is whether the "courtesy" transportation activities of Grouse Mountain are those of a regulated motor carrier as falling within the definition of "motor carrier" provided in Section 69-12-101(7), MCA (and related provisions), or whether they are those of an unregulated private carrier as being exempt or excluded from that definition.

9. Comments on the matter were received from a number of interested persons. These include Billings Yellow Cab, Johnson, North Valley Refuse (Whitefish), Montana Innkeepers Association, Kalispell Taxi Service, City Cab (Billings), Grouse Mountain, and Big Mountain Resort (Whitefish). Those generally in favor of courtesy transportation being excluded from regulation comment that: the competitive resort and hotel industry must provide every convenience for guests; commonly provided courtesy transportation has not been and should not be classified as motor carriage; and a declaration that such transportation is regulated would be impractical, unreasonable, and create an undue hardship. Grouse Mountain, in addition to arguing that its transportation is incidental, argues that its transportation is merely "accommodative."

10. Those generally in opposition to courtesy transportation being excluded from regulation comment that: regulated transportation companies should handle the transportation needs of the public; hotel transportation should be regulated and required to meet the same standards for the safety of the public and the welfare of the transportation industry; unregulated courtesy transportation undermines stability of regulated carriers through increased

loss of riders and increased rates to those riders remaining; and Montana public policy is to promote and protect public transportation. Several comments suggest that hotel courtesy transportation without a fee might be incidental, but with a fee it is not. Johnson submits that the primary business test does not apply to the transportation of passengers. City Cab comments that the "primary business test" includes a consideration of competition with those in the transportation business.

11. The PSC determines that a part of Grouse Mountain's transportation activities is regulated motor carriage and a part is not. The analysis of the question presented begins with the statutory definition of "motor carrier." Insofar as it is applicable to Grouse Mountain's circumstances, a "motor carrier" is any person operating a motor vehicle for the transportation of persons for hire on a commercial basis. See, generally, Section 69-12-101(7), MCA. Within this definition "for hire" means remuneration of any kind, direct or indirect. See, generally, Section 69-12-101(5), MCA. Within the definition of "motor carrier," "on a commercial basis" means "as a business, not in the sense of having profit as a primary aim or any other similar sense, but in the sense of being a serious concern regularly and habitually engaging the time and effort of the carrier." See, In the Matter of Department of Commerce, paras. 22-36, PSC Docket No. T-9597, Declaratory Ruling (January 25, 1991).

12. Grouse Mountain meets all of the statutorily expressed elements of the definition of "motor carrier." Under the given facts, it is clearly a "person," it clearly operates one or more motor vehicles, and it clearly transports persons (passengers). It also transports "for hire." Without even considering the nominal fee charged for transportation between its hotel and downtown Whitefish, "for hire" exists as its hotel guests pay for lodging, food, and beverages in a for-profit setting. In such a case it reasonably must be imputed that a portion of the revenues obtained are actually assigned to cover the costs of transportation. Remuneration of some kind is received, albeit indirectly. Given the definition of "for hire" (remuneration of any kind, direct or indirect), it seems unlikely that there could normally be any transportation in a for-profit setting that is not "for hire" in some qualifying fashion. Grouse Mountain also operates "on a commercial basis," as the transportation regularly and habitually engages its time.

13. However, a legal analysis of who is a "motor carrier" does not end with review of the expressed elements in the statutory definition of "motor carrier." There are additional elements or considerations bearing on whether transportation activity is that of a "motor carrier." There are exemptions (see, e.g., Section 69-12-102, MCA) and there are exclusions. No statutory exemptions appear to apply in Grouse Mountain's case ("accommodative transportation," Section 69-12-105, MCA, will be discussed later). However, at least one exclusion is potentially applicable -- the "primary business test."

14. The "primary business test" exclusion is not expressly codified by statute. However, it is valid case law, based on a long-standing judicial interpretation of the statutory definition of "motor carrier." In Board of Railroad Commissioners v. Gamble-Robinson Co., 111 Mont. 441, 111 P.2d 306 (1941), the Montana Supreme Court reasoned that "engaged in the transportation" (found in the title of Chapter 184, L. 1931, the Montana law first establishing the definition of "motor carrier") did not mean engaged in some other service and merely transporting in connection therewith. The Court held that transportation "as an incident to the conduct of their lawful business" was not motor carriage. 111 P.2d at 310-311. The Gamble-Robinson "incident to" rule essentially prescribes that transportation activity done as an incident to a principal nontransportation business is not an act within the definition of "motor carrier." Such incidental transportation is excluded from the definition of "motor carrier."

15. The Gamble-Robinson "incident to" rule is now commonly referred to as the "primary business test," a term coined from the name for a similar concept long used in federal motor carrier regulation and now codified at 49 USC 10524. The essential elements of the Gamble-Robinson "incident to" rule or the "primary business test" are that there must be a principal real nontransportation service, business, or occupation to which related transportation activities are incidental (in the scope of, in furtherance of, and subordinate to). See, In the Matter of Department of Commerce, paras. 37-52, PSC Docket No. T-9597, Declaratory Ruling (January 25, 1991). Transportation which meets these elements and is thereby incidental to a principal nontransportation business is not within the definition of "motor carrier."

16. Grouse Mountain does have a real nontransportation business. The business is that of a hotel -- providing lodging, food, and beverages to paying guests. Under the given facts and what is otherwise virtually self-evident about common hotel operations, the PSC views it as unnecessary to study the matter further to reach the conclusion that Grouse Mountain's hotel operations are primary in relation to its transportation operations. Grouse Mountain's transportation of its hotel guests is secondary. The PSC also views it as a certainty that the hotel operations can be categorized as Grouse Mountain's principal business -- the other activities, including transportation, are subordinate.

17. However, merely categorizing one aspect of a business as primary and another as secondary is not the analysis applied in the "primary business test." The "primary business test" is not concerned with "primary" and "secondary," it is concerned with "principal" and "incidental." In order for something to qualify as being secondary it must merely be subordinate. In order for something to qualify as being incidental it must be subordinate to and also in furtherance of and in the scope of. See generally, Department of Commerce, Id., at para. 46. Under the "primary business test," once it has been determined that there is a real primary or principal non-transportation business to which related transportation activities are subordinate, the transportation activities must be evaluated to determine if they meet the other criteria of being incidental--"in the furtherance of" and "in the scope of."

18. Grouse Mountain's business is to provide lodging, food, and beverages. For the transportation to be incidental under the "primary business test" the transportation must be "in the furtherance of" and "in the scope of" providing lodging, food, and beverages. "In the furtherance of" generally implies a direct promotion or advancement of something. For purposes of the "primary business test" the qualifying transportation element must directly promote or advance the qualifying nontransportation element. In Grouse Mountain's case, transportation "in the furtherance of" would be that which directly promotes or advances the business of providing lodging, food, and beverages. "In the scope of" generally implies being directly within the boundaries, extent, or range of something. For purposes of the "primary business test" the boundaries, extent, or range of a qualifying nontransportation business limits or defines the permissible boundaries, extent, or range of the transportation aspect of the business. In Grouse

Mountain's case, transportation "in the scope of" would be limited to that which is directly within the boundaries of Grouse Mountain's business of providing lodging, food, or beverages.

19. In its business it appears that Grouse Mountain engages in transportation of two general types. One type is that of transporting guests between its hotel and other common carriers such as airlines and railroads (Amtrack). The other type is that of transporting guests between its hotel and the local downtown area (Whitefish) or a local recreation area (Big Mountain). These two general types of transportation have distinctions that will become apparent in regard to the proper application of the "primary business test."

20. Transportation between Grouse Mountain's hotel and a point at which guests connect with the identified other means of transportation meets the criteria for being incidental. It is in furtherance of the business of providing lodging, food, and beverages because it directly benefits, promotes, and encourages the hotel business (lodging, meals, and beverages) by providing a convenient means of conveying guests to and from the hotel, directly for hotel purposes. It is in the scope of the business of providing lodging, food, and beverages because it facilitates nothing other than those things directly within the scope of a business providing lodging, food, and beverages. This type of transportation is incidental and not motor carriage.

21. Transportation between Grouse Mountain Lodge and a point at which guests engage is some activity such as sports, recreation, shopping, sight seeing, amusement, business dealings, and other might be in the furtherance of a lodging business from a promotional standpoint. However, such is not properly within the scope of a business providing lodging, meals, and beverages. Such transportation facilitates things outside of the boundaries of the hotel business. Providing lodging, food, and beverages does not encompass these other things. Even though the transportation may be convenient and desirable to guests, it strays beyond the scope of a business providing lodging, meals, and beverages. This type of transportation is regulated motor carriage.

22. The PSC concludes that Grouse Mountain's transportation of hotel guests is partly unregulated private carriage and partly motor carriage as explained above. Grouse Mountain must engage the services of a motor carrier or obtain motor carrier authority to transport its guests between its hotel and points such as Big Mountain Resort or downtown Whitefish.

Analysis of Other Points Raised

23. Several comments relate to a distinction between courtesy transportation for a fee and that for which no fee is assessed. Although that part of Grouse Mountain's transportation activities for which a fee is assessed has been declared motor carriage anyway, it should be noted that the existence of a nominal fee charged for transportation that is incidental to a principal business is generally inconsequential to the analysis. In a for-profit setting "for hire" generally will be imputed in any event and unless the fee assessed generates revenues to such an extent that, in conjunction with all other factors, the transportation aspect of a business becomes the principal undertaking, it usually justifies no consideration.

24. Grouse Mountain suggests that its transportation is accommodative. Section 69-12-105, MCA, provides that "accommodative transportation" is not a service for hire even though the persons transported share in the cost or pay for the movement. The transportation that Grouse Mountain provides is not "accommodative" within the meaning of Section 69-12-105, MCA. "Accommodative" refers to a transportation movement that arises sporadically or occasionally, normally without design or obligation, as a convenience or courtesy. Grouse Mountain's transportation is regular. Furthermore, insofar as Grouse Mountain's transportation is in a for-profit setting and is not otherwise excluded from the definition of "motor carrier" it would be defined as a "transportation business" to which the "accommodative transportation" exclusion is not available. See also, Section 69-12-105, MCA.

25. Johnson questions whether the primary business test applies to the transportation of passengers. It does. The exact logic applied in Gamble-Robinson to the transportation of property applies equally to the transportation of persons (passengers). The same statute is involved, no change in rationale is required, there simply is no reason to distinguish between property and persons in this regard. The "primary business test" is applicable to the transportation of passengers.

26. City Cab suggests that the primary business test includes a consideration of competition with those engaged in the transportation business. The PSC has previously considered competition with regulated carriers as a reason not to apply the "primary business test." See, In the Matter of Marvin Shock, Declaratory Ruling, PSC Docket No. T-9157 (May 3, 1988). The PSC has departed from this consideration of

competition, although it appears that the Shock ruling would remain the same for other reasons. Upon reevaluation since Shock, it does not now appear that Gamble-Robinson actually includes competition as a required and determinative factor in an analysis of whether transportation is incidental. Additionally, a consideration of competition, if applied strictly, would essentially render the "primary business test" meaningless as there simply is no incidental transportation that does not compete with regulated carriers to some extent.

27. Several participants comment that public transportation is to be preserved by the PSC. This is true. However, public transportation can only be preserved in a fashion that correctly applies the governing law. Exemptions and exclusions from the definition of "motor carrier" exist and must be considered and applied.

28. It should be finally noted that a number of Montana businesses operate to serve persons who are enjoying the many recreational opportunities that are available in this state. Hotels, motels, guest ranch lodges, outfitter lodges, and like facilities are no exception. By this ruling, which applies only to Grouse Mountain as the facts are given by Grouse Mountain, the PSC is not attempting to declare that businesses providing comprehensive services relating to recreational opportunities and also provide services that entail lodging or motor carrier transportation of guests will be found to be engaged in regulated transportation. Until all general possibilities in this regard are presented and considered, questions must be analyzed on a case by case basis.

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Under the facts presented, Grouse Mountain, having a principal nontransportation hotel business providing lodging, meals, and beverages, may transport its registered guests between (to or from) its hotel and points of connection with other common carriers without obtaining motor carrier authority. Such transportation is not within the definition of "motor carrier" as it is incidental to the principal nontransportation hotel business of providing lodging, meals, and beverages. Grouse Mountain cannot lawfully transport its registered guests between (to or from) its hotel and other points or places referenced within the facts presented without engaging the services of a regulated motor carrier or obtaining proper motor carrier authority. Such transportation is within the definition of "motor carrier" and is not

incidental to a principal nontransportation hotel business of providing lodging, meals, and beverages.

Done and dated this 18th day of August, 1993, by a vote of 3 - 2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ANDERSON, Chairman
(Voting to Dissent)

BOB ROWE, Vice Chairman
(Voting to Dissent)

DAVE FISHER, Commissioner

NANCY MCCAFFREE, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.

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declaratory ruling on the)
application of motor carrier laws) Docket No. T93.33.DR
to the transportation of hotel)
guests.)

Dissent of Commissioners Anderson and Rowe

The majority opinion is a reasoned statement of the Commission's interpretation of the "primary business" exception to motor carrier regulation. However, it reaches a conclusion in which we cannot fully concur; therefore, we dissent.

The Commission must faithfully execute the laws passed by the legislature. The legislature long ago decided that having a stable motor carrier industry is in the public interest. Because that industry can be destabilized by excessive competition, "entry" is regulated by the Commission. It may be in the public interest to protect existing carriers if additional entry would harm them.

In this case, the Commission's order is intended to protect a local carrier which is subject to regulation (City Taxi) from actual or alleged competition by a party (Grouse Mountain) which is not currently regulated. The majority opinion is premised on the concern that "cream skimming" of a highly-profitable segment of the market by an unregulated carrier may weaken the regulated carrier, and thereby harm transportation service to the community. This is a legitimate concern, but one not supported by the record.

Grouse Mountain transports only its guests and not the general public. Furthermore, Grouse Mountain invested in transportation equipment because the existing carriers were not meeting

its needs. The regulated carrier, therefore, is not harmed by the transportation provided by Grouse Mountain.

The second crux of the case is the "primary business test." Is the transportation provided by Grouse Mountain "incidental" to and "within the scope of" its primary business? The majority opinion is that the portion of the transportation which connects with other common carriers is indeed exempted by this

test, but that other transportation, such as regular shuttles for guests to the Big Mountain ski area, is not.

This logic is difficult to constrain. Would dude ranches and outfitters be required to use a regulated carrier to take guests to town? Possibly. Would hotel guests on the outskirts of a city be required to call a taxi for spur-of-the-moment trips, rather than using a courtesy van? Probably. Is so, is public convenience really served? If not, would regulated carriers be harmed?

In applying the primary business test, the majority correctly focused on the distinction between principal and incidental activities--those which are in the furtherance of or in the scope of the non-transportation business. The ruling identifies Grouse Mountain's business as "providing lodging, food and beverages." Although this description was supplied by Grouse Mountain itself, a more accurate description might be "providing recreational experiences." Such a description might affect the outcome of the case.

For these reasons, we dissent.

RESPECTFULLY SUBMITTED this 20th day of August, 1993

Bob Anderson, Chairman

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Bob Rowe, Vice-Chair